

Thomas Jefferson to George Washington, April 28, 1793, with Enclosure on Opinions on Suspending Treaties with France , from The Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

TO THE PRESIDENT OF THE UNITED STATES W. MSS.

Philadelphia Apr. 28. 1793.

Sir, —According to the intimation the other day, and indeed according to my own wish in a question, if not difficult, yet very important, I have the honor to inclose you a written opinion on the question Whether the U S. ought to declare their treaties with France void, or suspended?

This contains my answer to the 2d. 3d. 4th. 5th. & 6th. of the written queries.

The 1st. had been before answered & acted on.

The 7th. 8th. 9th. & 10th. are questions on the Guarantee, which it may possibly never be necessary to answer; or if we should be called on we may then take due time to give in the answer, which must always be framed in a considerable degree on the circumstances existing at that moment.

The 4th. page of the inclosed contains my answer to the 11th.

The 12th. I answer by saying that if the Nation of France shall ever reestablish such an officer as Regent (of which there is no appearance at present) I should be for receiving a

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Minister from him: but I am not for doing it from any Regent, so christened, and set up by any other authority.

The 13th. has been decided negatively

OPINION ON FRENCH TREATIES W. MSS.

Apr. 28, 1793.

I proceed, in compliance with the requisition of the President, to give an opinion in writing on the general Question, Whether the U S. have a right to renounce their treaties with France, or to hold them suspended till the government of that country shall be established?

In the Consultation at the President's on the 19th inst. the Secretary of the Treasury took the following positions & consequences. "France was a monarchy when we entered into treaties with it: but it has now declared itself a Republic, & is preparing a Republican form of government. As it may issue in a Republic, or a Military despotism, or in something else which may possibly render our alliance with it dangerous to ourselves, we have a right of election to renounce the treaty altogether, or to declare it suspended till their government shall be settled in the form it is ultimately to take; and then we may judge whether we will call the treaties into operation again, or declare them forever null. Having that right of election now, if we receive their minister without any qualifications, it will amount to an act of election to continue the treaties; & if the change they are undergoing should issue in a form which should bring danger on us, we shall not be then free to renounce them. To elect to continue them is equivalent to the making a new treaty at this time in the same form, that is to say, with a clause of guarantee; but to make a treaty with a clause of guarantee, during a war, is a departure from neutrality, and would make us associates in the war. To renounce or suspend the treaties therefore is a necessary act of neutrality."

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If I do not subscribe to the soundness of this reasoning, I do most fully to its ingenuity.—I shall now lay down the principles which according to my understanding govern the case.

I consider the people who constitute a society or nation as the source of all authority in that nation, as free to transact their common concerns by any agents they think proper, to change these agents individually, or the organisation of them in form or function whenever they please: that all the acts done by those agents under the authority of the nation, are the acts of the nation, are obligatory on them, & enure to their use, & can in no wise be annulled or affected by any change in the form of the government, or of the persons administering it. Consequently the Treaties between the U S. and France, were not treaties between the U S, & Louis Capet, but between the two nations of America & France, and the nations remaining in existence, tho' both of them have since changed their forms of government, the treaties are not annulled by these changes.

The Law of nations, by which this question is to be determined, is composed of three branches, 1. The Moral law of our nature. 2. The Usages of nations. 3. Their special Conventions. The first of these only, concerns this question, that is to say the Moral law to which Man has been subjected by his creator, & of which his feelings, or Conscience as it is sometimes called, are the evidence with which his creator has furnished him. The Moral duties which exist between individual and individual in a state of nature, accompany them into a state of society & the aggregate of the duties of all the individuals composing the society constitutes the duties of that society towards any other; so that between society & society the same moral duties exist as did between the individuals composing them while in an unassociated state, their maker not having released them from those duties on their forming themselves into a nation. Compacts then between nation & nation are obligatory on them by the same moral law which obliges individuals to observe their compacts. There are circumstances however which sometimes excuse the non-performance of contracts between man & man: so are there also between nation & nation. When performance, for instance, becomes *impossible*, non-performance is not immoral. So if performance

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becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation to others. For the reality of these principles I appeal to the true fountains of evidence, the head & heart of every rational & honest man. It is there Nature has written her moral laws, & where every man may read them for himself. He will never read there the permission to annul his obligations for a time, or for ever, whenever they become “dangerous, useless, or disagreeable.” Certainly not when merely *useless* or *disagreeable*, as seems to be said in an authority which has been quoted, Vattel, 2. 197, and tho he may under certain degrees of *danger*, yet the danger must be imminent, & the degree great. Of these, it is true, that nations are to be judges for themselves, since no one nation has a right to sit in judgment over another. But the tribunal of our consciences remains, & that also of the opinion of the world. These will revise the sentence we pass in our own case, & as we respect these, we must see that in judging ourselves we have honestly done the part of impartial & vigorous judges.

But Reason, which gives this right of self-liberation from a contract in certain cases, has subjected it to certain just limitations.

I. The danger which absolves us must be great, inevitable & imminent. Is such the character of that now apprehended from our treaties with France? What is that danger, 1. Is it that if their government issues in a military despotism, an alliance with them may taint us with despotic principles? But their government, when we allied ourselves to it, was a perfect despotism, civil & military, yet the treaties were made in that very state of things, & therefore that danger can furnish no just cause. 2. Is it that their government may issue in a

republic, and too much strengthen our republican principles? But this is the hope of the great mass of our constituents, & not their dread. They do not look with longing to the happy mean of a limited monarchy. 3. But says the doctrine I am combating, the change the French are undergoing may possibly end in something we know not what, and bring on us danger we know not whence. In short it may end in a Rawhead & bloody-bones in the

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dark. Very well. Let Rawhead & bloody bones come, & then we shall be justified in making our peace with him, by renouncing our antient friends & his enemies. For observe, it is not the *possibility of danger*, which absolves a party from his contract: for that possibility always exists, & in every case. It existed in the present one at the moment of making the contract. If *possibilities* would avoid contracts, there never could be a valid contract. For possibilities hang over everything. Obligation is not suspended, till the danger is become real, & the moment of it so imminent, that we can no longer avoid decision without forever losing the opportunity to do it. But can a danger which has not yet taken it's shape, which does not yet exist, & never may exist, which cannot therefore be defined, can such a danger I ask, be so imminent that if we fail to pronounce on it in this moment we can never have another opportunity of doing it?

4. The danger apprehended, is it that, the treaties remaining valid, the clause guarantying their West India islands will engage us in the war? But Does the Guarantee engage us to enter into the war in any event?

Are we to enter into it before we are called on by our allies? Have we been called on by them?—shall we ever be called on? Is it their interest to call on us?

Can they call on us before their islands are invaded, or imminently threatened?

If they can save them themselves, have they a right to call on us?

Are we obliged to go to war at once, without trying peaceable negociations with their enemy?

If all these questions be against us, there are still others behind.

Are we in a condition to go to war?

Can we be expected to begin before we are in condition?

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Will the islands be lost if we do not save them? Have we the means of saving them?

If we cannot save them are we bound to go to war for a desperate object?

Will not a 10. years forbearance in us to call them into the guarantee of our posts, entitle us to some indulgence?

Many, if not most of these questions offer grounds of doubt whether the clause of guarantee will draw us into the war. Consequently if this be the danger apprehended, it is not yet certain enough to authorize us in sound morality to declare, at this moment, the treaties null.

5. Is the danger apprehended from the 17th article of the treaty of Commerce, which admits French ships of war & privateers to come and go freely, with prizes made on their enemies, while their enemies are not to have the same privilege with prizes made on the French? But Holland & Prussia have approved of this article in our treaty with France, by subscribing to an express Salvo of it in our treaties with them. [Dutch treaty 22. Convention 6. Prussian treaty 19.] And England in her last treaty with France [art. 40] has entered into the same stipulation verbatim, & placed us in her ports on the same footing on which she is in ours, in case of a war of either of us with France. If we are engaged in such a war, England must receive prizes made on us by the French, & exclude those made on the French by us. Nay further, in this very article of her treaty with France, is a salvo of any similar article in any anterior treaty of either party, and ours with France being anterior, this salvo confirms it expressly. Neither of these three powers then have a right to complain of this article in our treaty.

6. Is the danger apprehended from the 22d. Art. of our treaty of commerce, which prohibits the enemies of France from fitting out privateers in our ports, or selling their prizes here. But we are free to refuse the same thing to France, there being no stipulation to the contrary, and we ought to refuse it on principles of fair neutrality.

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7. But the reception of a Minister from the Republic of France, without qualifications, it is thought will bring us into danger: because this, it is said, will determine the continuance of the treaty, and take from us the right of self-liberation when at any time hereafter our safety would require us to use it. The reception of the Minister at all (in favor of which Colo. Hamilton has given his opinion, tho reluctantly as he confessed) is an acknowledgement of the legitimacy of their government: and if the qualifications meditated are to deny that legitimacy, it will be a curious compound which is to admit & deny the same thing. But I deny that the reception of a Minister has any thing to do with the treaties. There is not a word, in either of them, about sending ministers. This has been done between us under the common usage of nations, & can have no effect either to continue or annul the treaties.

But how can any act of election have the effect to continue a treaty which is acknowledged to be going on still? For it was not pretended the treaty was void, but only voidable if we chose to declare it so. To make it void would require an act of election, but to let it go on requires only that we should do nothing, and doing nothing can hardly be an infraction of peace or neutrality.

But I go further & deny that the most explicit declaration made at this moment that we acknowledge the obligation of the treaties could take from us the right of non-compliance at any future time when compliance would involve us in great & inevitable danger.

I conclude then that few of these sources threaten any danger at all; and from none of them is it inevitable: & consequently none of them give us the right at this moment of releasing ourselves from our treaties.

II. A second limitation on our right of releasing ourselves is that we are to do it from so much of the treaties only as is bringing great & inevitable danger on us, & not from the residue, allowing to the other party a right at the same time to determine whether on our non-compliance with that part they will declare the whole void. This right they would have, but we should not. Vattel. 2. 202. The only part of the treaties which can really lead us into

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danger is the clause of guarantee. That clause is all then we could suspend in any case, and the residue will remain or not at the will of the other party.

III. A third limitation is that where a party from necessity or danger withholds compliance with part of a treaty, it is bound to make compensation where the nature of the case admits & does not dispense with it. 2. Vattel 324. Wolf. 270. 443. If actual circumstances excuse us from entering into the war under the clause of guarantee, it will be a question whether they excuse us from compensation. Our weight in the war admits of an estimate; & that estimate would form the measure of compensation.

If in withholding a compliance with any part of the treaties, we do it without just cause or compensation, we give to France a cause of war, and so become associated in it on the other side. An injured friend is the bitterest of foes, & France had not discovered either timidity, or over-much forbearance on the late occasions. Is this the position we wish to take for our constituents? It is certainly not the one they would take for themselves.

I will proceed now to examine the principal authority which has been relied on for establishing the right of self liberation; because tho' just in part, it would lead us far beyond justice, if taken in all the latitude of which his expressions would admit. Questions of natural right are triable by their conformity with the moral sense & reason of man. Those who write treatises of natural law, can only declare what their own moral sense & reason dictate in the several cases they state. Such of them as happen to have feelings & a reason coincident with those of the wise & honest part of mankind, are respected & quoted as witnesses of what is morally right or wrong in particular cases. Grotius, Puffendorf, Wolf, & Vattel are of this number. Where they agree their authority is strong. But where they differ, & they often differ, we must appeal to our own feelings and reason to decide between them.

The passages in question shall be traced through all these writers, that we may see wherein they concur, & where that concurrence is wanting. It shall be quoted from them in

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the order in which they wrote, that is to say, from Grotius first, as being the earliest writer, Puffendorf next, then Wolf, & lastly Vattel as latest in time.

Grotius. 2. 16. 16.

“Hither must be referred the common question, concerning personal & real treaties. If indeed it be with a free people, there can be no doubt but that the engagement is in it's nature real, because the subject is a permanent thing, and even tho the government of the state be changed into a Kingdom, the treaty remains, because the same body remains, tho' the head is changed, and, as we have before said, the government which is exercised by a King, does not cease to be the government of the people. There is an *exception*, when the object seems peculiar to the government as if free cities contract a league for the defence of their freedom.”

Puffendorf. 8. 9. 6.

“It is certain that every alliance made with a republic, is real, & continues consequently to the term agreed on by the treaty, altho' the magistrates who concluded it be dead before, or that the form of government is changed, even from a democracy to a monarchy: for in this case the people does not cease to be the same, and the King, in the case supposed, being established by the consent of the people, who abolished the republic an government, is understood to accept the crown with all the engagements which the people conferring it had contracted, as being free & governing themselves. There must nevertheless be an *Exception* of the alliances contracted with a view to preserve the present government. As if two Republics league for neutral defence against those who would undertake to invade their liberty: for if one of these two people consent afterwards voluntarily to change the form of their government, the alliance ends of itself, because the reason on which it was founded no longer subsists.”

Wolf. 1146.

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“The alliance which is made with a free people, or with a popular government, is a real alliance; and as when the form of government changes, the people remains the same, (for it is the association which forms the people, & not the manner of administering the government) this alliance subsists, tho' the form of government changes, *unless*, as is evident, the reason of the alliance was particular to the popular state.”

Vattel. 2. 197.

“The same question presents itself in real alliances, & in general on every alliance made with a state, & not in particular with a King for the defense of his person. We ought without doubt to defend our ally against all invasion, against all foreign violence, & even against rebel subjects. We ought in like manner to defend a republic against the enterprises of an oppressor of the public liberty. But we ought to recollect that we are the ally of the state, or of the nation, & not it's judge. If the nation has deposed it's King in form, if the people of a republic has driven away it's magistrates, & have established themselves free, or if they have acknowledged the authority of an usurper, whether expressly or tacitly, to oppose these domestic arrangements, to contest their justice or validity, would be to meddle with the government of the nation, & to do it an injury. The ally remains the ally of the state, notwithstanding the change which has taken place. *But if this change renders the alliance useless, dangerous or disagreeable to it, it is free to renounce it. For it may say with truth, that it would not have allied itself with this nation, if it had been under the present form of it's government.*”

The doctrine then of Grotius, Puffendorf & Wolf is that “treaties remain obligatory notwithstanding any change in the form of government, except in the single case where the preservation of that form was the object of the treaty.” There the treaty extinguishes, not by the election or declaration of the party remaining in statu quo; but independantly of that, by the evanishment of the object. Vattel lays down, in fact, the same doctrine, that treaties continue obligatory, notwithstanding a change of government by the will of the other party, that to oppose that will would be a wrong, & that the ally remains an

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ally notwithstanding the change. So far he concurs with all the previous writers. But he then adds what they had not said, nor would say “but if this change renders the alliance *useless*, dangerous, or *disagreeable* to it, it is free to renounce it.” It was unnecessary for him to have specified the exception of *danger* in this particular case, because that exception exists in all cases & it's extent has been considered. But when he adds that, because a contract is become merely *useless* or *disagreeable*, we are free to renounce it, he is in opposition to Grotius, Puffendorf, & Wolf, who admit no such licence against the obligation of treaties, & he is in opposition to the morality of every honest man, to whom we may safely appeal to decide whether he feels himself free to renounce a contract the moment it becomes merely useless or disagreeable, to him? We may appeal too to Vattel himself, in those parts of his book where he cannot be misunderstood, & to his known character, as one of the most zealous & constant advocates for the preservation of good faith in all our dealings. Let us hear him on other occasions; & first where he shews what degree of danger or injury will authorize self-liberation from a treaty. “If simple lezion” (lezion means the loss sustained by selling a thing for less than half value, which degree of loss rendered the sale void by the Roman law), “if simple lezion, says he, or some degree of disadvantage in a treaty does not suffice to render it invalid, it is not so as to inconveniences which would go to the *ruin* of the nation. As every treaty ought to be made by a sufficient power, a treaty pernicious to the state is null, & not at all obligatory; no governor of a nation having power to engage things capable of *destroying* the state, for the safety of which the empire is trusted to him. The nation itself, bound necessarily to whatever it's preservation & safety require, cannot enter into engagements contrary to it's indispensable obligations.” Here then we find that the degree of injury or danger which he deems sufficient to liberate us from a treaty, is that which would go to the absolute *ruin* or *destruction* of the state; not simply the lezion of the Roman law, not merely the being disadvantageous or dangerous. For as he says himself § 158. “lezion cannot render a treaty invalid. It is his duty, who enters into engagements, to weigh well all things before he concludes. He may do with his property what he pleases, he may relinquish his rights, renounce his advantages, as he

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judges proper: the acceptant is not obliged to inform himself of his motives nor to weigh their just value. If we could free ourselves from a compact because we find ourselves injured by it, there would be nothing firm in the contracts of nations. Civil laws may set limits to lezion, & determine the degree capable of producing a nullity of the contract. But sovereigns acknowledge no judge. How establish lezion among them? Who will determine the degree sufficient to invalidate a treaty? The happiness & peace of nations require manifestly that their treaties should not depend on a means of nullity so vague & so dangerous.”

Let us hear him again on the general subject of the observance of treaties § 163. “It is demonstrated in natural law that he who promises another confers on him a perfect right to require the thing promised, & that, consequently, not to observe a perfect promise, is to violate the right of another; it is as manifest injustice as to plunder any one of their right. All the tranquillity, the happiness & security of mankind rest on justice, on the obligation to respect the rights of others. The respect of others for our rights of domain & property is the security of our actual possessions; the faith of promises is our security for the things which cannot be delivered or executed on the spot. No more security, no more commerce among men, if they think themselves not obliged to preserve faith, to keep their word. This obligation then is as necessary as it is natural & indubitable, among nations who live together in a state of nature, & who acknowledge no superior on earth, to maintain order & peace in their society. Nations & their governors then ought to observe inviolably their promises & their treaties. This great truth, altho' too often neglected in practice, is generally acknowledged by all nations; the reproach of perfidy is a bitter affront among sovereigns: now he who does not observe a treaty is assuredly perfidious, since he violates his faith. On the contrary nothing is so glorious to a prince & his nation, as the reputation of inviolable fidelity to his word?” Again § 219. “Who will doubt that treaties are of the things sacred among nations? They decide matters the most important. They impose rules on the pretensions of sovereigns: they cause the rights of nations to be acknowledged, they assure their most precious interests. Among political bodies, sovereigns,

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who acknowledge no superior on earth, treaties are the only means of adjusting their different pretensions, of establishing a rule, to know on what to count, on what to depend. But treaties are but vain words if nations do not consider them as respectable engagements, as rules, inviolable for sovereigns, & sacred through the whole earth. § 220. The faith of treaties, that firm & sincere will, that invariable constancy in fulfilling engagements, of which a declaration is made in a treaty, is there holy & sacred, among nations, whose safety & repose it ensures; & if nations will not be wanting to themselves, they will load with infamy whoever violates his faith.”

After evidence so copious & explicit of the respect of this author for the sanctity of treaties, we should hardly have expected that his authority would have been resorted

to for a wanton invalidation of them whenever they should become merely *useless* or *disagreeable*. We should hardly have expected that, rejecting all the rest of his book, this scrap would have been culled, & made the hook whereon to hang such a chain of immoral consequences. Had the passage accidentally met our eye, we should have imagined it had fallen from the author's pen under some momentary view, not sufficiently developed to found a conjecture what he meant: and we may certainly affirm that a fragment like this cannot weigh against the authority of all other writers, against the uniform & systematic doctrine of every work from which it is torn, against the moral feelings & the reason of all honest men. If the terms of the fragment are not misunderstood, they are in full contradiction to all the written & unwritten evidences of morality: if they are misunderstood, they are no longer a foundation for the doctrines which have been built on them.

But even had this doctrine been as true as it is manifestly false, it would have been asked, to whom is it that the treaties with France have become *disagreeable*? How will it be proved that they are *useless*?

The conclusion of the sentence suggests a reflection too strong to be suppressed “for the party may say with truth that it would not have allied itself with this nation, if it had

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been under the present form of it's government." The Republic of the U. S. allied itself with France when under a despotic government. She changes her government, declares it shall be a Republic, prepares a form of Republic extremely free, and in the mean time is governing herself as such, and it is proposed that America shall declare the treaties void because "it may say with truth that it would not have allied itself with that nation, if it had been under the present form of it's government!" Who is the American who can say with truth that he would not have allied himself to France if she had been a republic? or that a Republic of any form would be as *disagreeable* as her antient despotism?

Upon the whole I conclude

That the treaties are still binding, notwithstanding the change of government in France: that no part of them, but the clause of guarantee, holds up *danger*, even at a distance.

And consequently that a liberation from no other part could be proposed in any case: that if that clause may ever bring *danger*, it is neither extreme, nor imminent, nor even probable: that the authority for renouncing a treaty, when *useless* or *disagreeable*, is either misunderstood, or in opposition to itself, to all their writers, & to every moral fleeing: that were it not so, these treaties are in fact neither useless nor disagreeable.

That the receiving a Minister from France at this time is an act of no significance with respect to the treaties, amounting neither to an admission nor a denial of them, forasmuch as he comes not under any stipulation in them:

That were it an explicit admission, or were an express declaration of this obligation now to be made, it would not take from us that right which exists at all times of liberating ourselves when an adherence to the treaties would be *ruinous* or *destructive* to the society: and that the not renouncing the treaties now is so far from being a breach of neutrality, that the doing it would be the breach, by giving just cause of war to France.